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# Tattoos and the First Amendment - Art Should Be Protected as Art: The South Carolina Supreme Court Upholds the State's Ban on Tattooing

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# TATTOOS AND THE FIRST AMENDMENT—ART SHOULD BE PROTECTED AS ART: THE SOUTH CAROLINA SUPREME COURT UPHOLDS THE STATE'S BAN ON TATTOOING

## I. INTRODUCTION

In 1999, a tattoo artist in Florence, South Carolina, gave a person a tattoo on the evening news. The image that he created was a "creative adaptation of an ancient tribal tattoo that signifies the onset of adulthood," and the event was filmed as a portion of a three-part series on the art of tattooing.[1] After the segment aired, the artist, Ron White, was arrested and subsequently convicted for the crime of tattooing.[2] He was sentenced to one year in prison and given a two thousand five hundred dollar fine, which was suspended to five years probation and a five hundred dollar fine plus costs.[3] In the thirty-year history of South Carolina's ban on tattooing, this is believed to be the only arrest.[4]

White challenged the statute on First Amendment grounds and lost. He appealed the decision to the Supreme Court of South Carolina, which affirmed the trial court's decision. Relying primarily on flag burning and eminent domain cases, the Supreme Court of South Carolina concluded that the art of tattooing is not entitled to First Amendment protection, that the state's interest in health and safety justifies the law, and that White failed to meet his burden of proof to show that the law is unreasonable.[5] The United States Supreme Court subsequently denied certiorari.[6]

An outright ban on an entire art form in a free society such as ours is inexplicable. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal."[7] The Constitution gives us the freedom to form, test, and express our own aesthetic and moral judgments about art, and "these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority."[8] This freedom under the First Amendment

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1. Petition for Writ of Certiorari at 5, White v. South Carolina, 537 U.S. 825 (2002) (No. 01-1859).
2. *Id.* at 5–6.
3. *Id.* at 6.
4. *Id.*
5. State v. White, 348 S.C. 532, 539, 560 S.E.2d 420, 423–24 (2002).
6. White v. South Carolina, 537 U.S. 825 (2002).
7. Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 641 (1994).
8. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 818 (2000).

is "within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action."[9]

Section II of this Note provides a brief history of the art of tattooing and an overview of the few cases that have dealt with bans similar to that of South Carolina. Section III challenges the South Carolina Supreme Court's analysis of the state's ban on tattooing. The author contends that tattooing should be protected as art, that legislation such as South Carolina's tattoo ban should be subject to heightened scrutiny under the First Amendment, and that the burden of proving the constitutionality of such legislation falls upon the government. Section IV provides a summary and recommendations for further action.

## II. BACKGROUND

### *A. History of the Art of Tattooing*

> Since the dawn of humanity, Tattoos have been made onto both sexes to decorate, enhance, and modify the skin we inherit at birth. Some Tattoos are self-motivated expressions of personal freedom and uniqueness. Most, however, have to do with traditions that mark a person as a member or nonmember of the local group, or express religious, magical, or spiritual beliefs and personal convictions. . . . [We] like the way they look on us, it [sic] reinforces a positive feeling about ourselves and connects us some how to an element of mystery and ancient activity.[10]

The art of tattooing has been practiced throughout the world for ages. The oldest known tattooed body was found frozen in the Austrian Alps and is 5300 years old.[11] Two thousand four hundred year-old mummies found in Siberia are tattooed with animals, griffins, and monsters, which are believed to represent the status of the individual.[12] Tattoos on female mummies found in Egypt are thought to be linked to fertility.[13] Tattoos were a prominent part of ancient cultures throughout the world, including Japan, Greece, and Rome, Central and South America, North America, and post eighteenth century Europe.[14] Initially, European culture largely viewed tattoos as "grotesque and

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9. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 500 (1952).

10. *Tribal Tattoo History and Symbolism*, *at* http://tribal-celtic-tattoo.com/tribal-history.htm (last visited Aug. 31, 2003).

11. The Australian Museum Online, *Tattooing: Earliest Examples* (2000), *at* http://www.amonline.net.au/bodyart/tattooing/earliest.htm (last visited Aug. 31, 2003).

12. *Id.*

13. *Id.*

14. *Id.*

frightful, the mark of a person exiled from proper society," and popular literature often linked tattooing with "cannibals, criminals, and lunatics."[15] However, by the end of the nineteenth century, tattooing became more popular in Europe and America, as restrictive Victorian social norms fell away.[16] In 1891, an electric tattooing machine was patented, allowing for easier, faster, and more ornate tattooing.[17]

The low point for tattoo artists in America came in the early 1960s, when a New York hepatitis outbreak was attributed to an unsanitary tattoo artist on Coney Island.[18] The media began to publicize stories of diseases contracted from tattoo artists, and in the ensuing uncertainty, many jurisdictions banned tattooing altogether.[19] In 1962, South Carolina enacted its own law banning tattooing, which simply states, "It shall be unlawful for any person to tattoo any part of the body of another person."[20] In 1986, an amendment was added that permitted "a licensed physician or surgeon to tattoo part of a patient's body if in his medical opinion it is necessary when performing cosmetic or reconstructive surgery."[21]

Tattooing has once again become widely accepted in America.[22] In the late 1980s and early 1990s, the panic of the 1960s subsided as understanding of the health risks improved, and tattoo artists began to form organizations to promulgate guidelines and safety procedures.[23] In 1985, the Centers for Disease Control and the Occupational Safety and Health Administration adopted guidelines for personal service workers, including tattoo artists, who come into contact with blood-borne pathogens.[24]

### *B. Challenges to State Bans on Tattooing*

There were several early constitutional challenges to tattoo bans on First

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15. Skin Deep—The Art of the Tattoo: The Spread of Tattooing, THE MARINER'S MUSEUM (1999) (on file with the *South Carolina Law Review.*).

16. *Id.*

17. *Id.*

18. Petition for Writ of Certiorari at 4, White v. South Carolina, 537 U.S. 825 (2002) (No. 01-1859).

19. *Id.*

20. S.C. CODE ANN. § 16-17-700 (Law. Co-op 1976).

21. *Id.*

22. *See, e.g.*, University of Pennsylvania Museum of Archaeology and Anthropology, Tattooing ("tattooing is probably the most popular form of body adornment in America today"), *at* http://www.museum.upenn.edu/new/exhibits/online_exhibits/body_modification/bodmodtattoo.shtml (last visited Aug. 31, 2003); *Body Art: Marks of Identity*, exhibit at American Museum of Natural History from November 20, 1999–May 29, 2000, *available at* http://www.amnh.org/exhibitions.bodyart.html (last visited Aug. 31, 2003).

23. Petition for Writ of Certiorari at 4, *White* (No. 01-1859).

24. *Id.*

Amendment and other grounds, but the statutes were generally upheld.[25] An overview of the cases dealing with bans on tattooing reveals the struggle of tattoo artists to dispel the illusions associated with their profession and provides insight into the South Carolina high court's decision.

The earliest reported case is *Grossman v. Baumgartner*.[26] The prohibition challenged in *Grossman* was a provision in New York City's Health Code; the ban was not statewide.[27] The New York state legislature had enacted provisions that only prohibited the tattooing of a child under 16 years of age or the tattooing of any person in connection with hazing.[28] The challenge was based on the City's constitutional authority to enact laws in a field that was arguably preempted by the state legislature.[29] There was no discussion of the First Amendment in the case. The New York court heard expert testimony on the risks involved in tattooing and the alternatives to a city-wide ban, and upheld the restriction because it had a rational basis.[30] In 1978, a trial court in New York again upheld the New York city regulation in a two paragraph opinion in which the court called tattooing "barbaric . . . often associated with a morbid or abnormal personality."[31]

In 1976, a tattoo artist challenged the statewide ban in Florida on the grounds that the statute made it unlawful to continue in her chosen profession, bore no reasonable relationship to the public health, safety, welfare, or morals, and violated the equal protection clause.[32] Relying solely on the *Grossman* decision and without further evidence, the court concluded that, "it would appear to be uncontradictable that tattooing is a source of the spread of this dread disease [hepatitis]. It would therefore follow indisputably that the control of tattooing comes well within the field of securing the health of the community."[33] A three-justice dissent argued that the law was unconstitutional because there is no reasonable relation between the health hazards of tattooing and the limitation of the art to those licensed to practice medicine.[34]

In *Yurkew v. Sinclair*,[35] a tattoo artist brought a First Amendment challenge to the refusal of the Minnesota State Fair to rent spaces for commercial

25. *Id.*
26. 271 N.Y.S.2d 195 (1966).
27. *Id.* at 197.
28. *Id.* at 200.
29. *Id.*
30. *Id.* at 198–99.
31. People v. O'Sullivan, 96 Misc. 2d 52, (N.Y. Sup. Ct. 1978) (quoting Grossman v. Baumgartner, 254 N.Y.S.2d 335, 338 (N.Y. App. Div. 1964)).
32. Golden v. McCarty, 337 So. 2d 388, 389 (Fla. 1976).
33. *Id.* at 391 (quoting *Grossman*, 254 N.Y.S.2d at 337).
34. *Id.* (Sundburg, J., dissenting).
35. 495 F. Supp. 1248 (D. Minn. 1980).

tattooing.[36] The state did not prohibit the practice of tattooing.[37] The U.S. District Court for the District of Minnesota determined that the appropriate test for First Amendment protection was whether the actual process of tattooing was "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."[38] The court decided that the question of whether tattooing is an art form was "essentially of marginal significance" to the First Amendment analysis[39] and that the regulation should be upheld under the rational basis test.[40] The court reasoned that the average observer would regard the tattoo itself as more communicative than the process of tattooing.[41]

In *State v. Brady*,[42] the State of Indiana and the Indiana Medical Licensing Board sought an injunction against a tattoo artist to prevent him from engaging in the "unlawful practice of medicine." Instead, the circuit court granted the artist relief against the Board and enjoined the state from enforcing its prohibition of tatooing as an art form.[43] The decision was reversed on appeal after the artist failed to file an appellate brief.[44] The relevant Indiana statute defined the "practice of medicine" as including "the performing of any kind of surgical operation upon a human being, including tattooing . . . for the intended palliation, relief, cure or prevention of any physical, mental or functional ailment or defect of any person."[45] Despite this statutory language, the court accepted the Board's interpretation of the statute as restricting all tattooing, for whatever purpose, to persons licensed to practice medicine.[46] Then, citing *Grossman* and *Yurkew*, the court found that tattooing posed a "very real risk of infection or transmission of communicable diseases," particularly hepatitis.[47]

More recently, a Massachusetts trial court found that a Massachusetts ban on tattooing violated the First Amendment.[48] The Massachusetts court found that "an articulable or particularized message is not a condition of constitutional

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36. *Id.* at 1249.
37. *Id.*
38. *Id.* at 1253 (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)).
39. *Id.*
40. *Id.* at 1255.
41. Yurkew v. Sinclair, 495 F. Supp. 1248, 1254 (D. Minn. 1980).
42. 492 N.E.2d 34 (Ind. Ct. App. 1986).
43. *Id.* at 35.
44. *Id.* at 36.
45. *Id.* at 36–37 (emphasis omitted).
46. *Id.* at 38.
47. *Id.* at 39 (citing Grossman v. Baumgartner, 254 N.Y.S.2d 335, 337 (N.Y. App. Div. 1964); Yurkew v. Sinclair, 495 F.Supp. 1248, 1252 (D. Minn. 1980)).
48. Memorandum of Decision and Order for Judgment on Cross-motions for Summary Judgment, Lanphear v. Commonwealth of Massachusetts, No. 99-1896-B (Mass. Super. Ct. Oct. 20, 2000). This order is also cited in Supplemental Record on Appeal Appendix, *White* (No. 99-GS-21-1543).

protection",[49] and that "First Amendment protection also encompasses paintings, drawings, engravings, and printed works. . . . It appears beyond argument that the drawn image is protected."[50] The court analyzed both the commonwealth's asserted interest in health and safety and modern procedures to reduce health risks, and determined that the commonwealth's concerns were "sufficiently addressed through licensing and regulation, the required use of universal precautions, and sanitary tattooing establishments."[51]

Since the 1960s, laws banning tattooing have been repealed in all states except two—South Carolina and Oklahoma.[52] The previous bans on tattooing have been replaced with substantially less restrictive means of protecting the public from potential dangers through sterilization and licensing requirements.[53]

## III. SOUTH CAROLINA'S TOTAL BAN ON THE ART OF TATTOOING IS UNCONSTITUTIONAL

Art should be protected as art, and a particularized message should not be a requirement for First Amendment protection. The Supreme Court of South Carolina relied primarily on cases that dealt with issues of expressive conduct, such as flag burning, to decide that Ron White's form of art is not protected under the First Amendment,[54] while overlooking United States Supreme Court decisions that actually deal with art forms. Having determined that tattooing is not protected under the First Amendment, the supreme court then relied primarily on Takings Clause cases to conclude that the rational basis test applies any time a statute's constitutionality is questioned, and that the burden of proof is always on the party challenging the statute.[55]

### *A. The Basis for the South Carolina Decision*

The Supreme Court of South Carolina held that "the First Amendment protects speech, including conduct, if sufficiently communicative in character" and that the threshold question is "whether the conduct in issue is 'sufficiently imbued with elements of communication to fall within the scope of the First

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49. *Id.* at 5 (citing Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995)).

50. *Id.* at 6 (citing Kaplan v. California, 413 U.S. 115, 119–20 (1973)).

51. *Id.* at 13–14.

52. *See* Brief of Amicus Curiae Center for Individual Freedom in Support of Petition for a Writ of Certiorari at 8, White v. South Carolina, 537 U.S. 825 (2002) (No. 01-1859) (noting that forty-eight other states have chosen substantially less restrictive means).

53. *Id.*

54. State v. White, 348 S.C. 532, 537, 560 S.E.2d 420, 423 (2002) (citing Spence v. Washington, 418 U.S. 405 (1974); Texas v. Johnson, 491 U.S. 397 (1989)).

55. *White*, 348 S.C. at 539, 560 S.E.2d at 424 (citing Main v. Thomason, 342 S.C. 79, 535 S.E.2d 918 (2000); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955)).

and Fourteenth Amendments.'"[56] Then the court determined that White had not shown that the "*process* of tattooing is communicative enough to automatically fall within First Amendment protection."[57] The court distinguished this from flag burning, which is protected because it conveys an obvious political message.[58]

This test, requiring that conduct be "sufficiently imbued with elements of communication" to be entitled to First Amendment protection, was articulated in *Spence v. Washington*.[59] *Spence* involved a statute that forbade the exhibition of a United States flag to which figures, symbols, or other extraneous material were attached or superimposed.[60] The appellant was arrested and convicted for displaying an American flag with a peace symbol attached to it to protest the invasion of Cambodia and the killings at Kent State University.[61] The challenge was to the statute as it was applied to Spence's actions, which were constitutionally protected only if there were a particular message that Spence was trying to convey.[62]

Additionally, the South Carolina Supreme Court found that there is a "general presumption of validity for legislative acts when subjected to constitutional attack, which can be overcome only by a clear showing that the act violates some provision of the Constitution."[63] Thus, the party challenging the constitutionality of the legislation bears the burden of proving the act is invalid, "leaving no room for reasonable doubt that it violates some provision of the Constitution."[64] Only then does the burden of proof shift to the state.[65] This analysis is consistent with South Carolina precedent and United States Supreme Court precedent concerning the Takings Clause,[66] but it is not applicable to First Amendment cases. The South Carolina court's requirement that White prove the act is invalid, "leaving no room for reasonable doubt that it violates some provision of the Constitution," has no support in the United

56. *Id.* at 537, 560 S.E.2d at 423 (quoting *Spence*, 418 U.S. at 409).
57. *Id.*
58. *Id.*
59. 418 U.S. 405 (1974).
60. *Id.* at 405.
61. *Id.* at 407–08.
62. *Id.* at 410–11.
63. State v. White, 348 S.C. 532, 536, 560 S.E.2d 420, 422 (2002) (citing Main v. Thomason, 342 S.C. 79, 535 S.E.2d 918 (2000); State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994)).
64. *Id.* at 536–537, 560 S.E.2d at 422.
65. *Id.*
66. *See, e.g.*, *Main*, 342 S.C. at 85–86, 535 S.E.2d at 921 (presuming the constitutionality of a statute against a Takings Clause Challenge); Midkiff v. Hawaii Hous. Auth., 467 U.S. 229, 242 (1984) (stating that in Takings Clause cases, the constitutional requirement is satisfied if the legislature rationally could have believed that the law would promote its objective).

States Supreme Court's precedents that address First Amendment challenges.[67] None of the cases that the South Carolina Supreme Court relies upon involve First Amendment concerns, and one, *City Council of Virginia Beach*, does not discuss any constitutional considerations whatsoever.[68]

### *B. Art Deserves Protection as Art*

The United States Supreme Court has expressly determined that the test articulated in *Spence* is inapplicable in the context of artistic expression. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,[69] the Court said that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Caroll."[70] The Constitution "looks beyond written or spoken words as mediums of expression."[71] South Carolina's ban on tattooing is directed at an entire art form, and

> [T]he question is simply whether it is expression, not whether it is the expression of a clearly discernable particularized

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67. *See, e.g.*, Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 664 (1994) (holding that the burden of proof is on the government to show the state interest is justified, and to demonstrate the nature of the harms that the regulation is designed to prevent); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 77 (1981) (holding that a statute which completely banned nude dancing throughout the borough of Ephraim in New Jersey was not subject to a presumption of validity); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 76 (1976) (Powell, J., concurring) (finding that "a substantial burden rests upon the State when it would limit in any way First Amendment rights"); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504 (1952) (stating that the state had a "heavy burden" to demonstrate that an unfettered authority to censor motion pictures was justified under the First Amendment); *cf.* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580–83 (1998) (stating that artists had a "heavy burden" to establish their constitutional claim, but noting that the statute in question did not impose any categorical requirement or expressly threaten censorship of ideas).

68. *See, e.g.*, *Main*, 340 S.C. 79, 535 S.E.2d 918 (involving a Takings Clause challenge to a statute allowing neighbors access through a homeowner's property to repair their homes); Westvaco Corp. v. South Carolina Dep't of Revenue, 321 S.C. 59, 467 S.E.2d 739 (1995) (involving a challenge to the constitutionality of a sales tax under the uniformity and equality provisions of the South Carolina Constitution); *Brown*, 317 S.C. 55, 451 S.E.2d 888 (involving a Due Process and Equal Protection challenge to a law imposing higher penalties for possession of crack cocaine than for other forms of cocaine); City Council of Virginia Beach v. Harrell, 372 S.E.2d 139 (Va. 1988) (involving a land owner's challenge to a zoning ordinance that prevented him from opening a gas station on his property); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955) (rejecting a challenge under the Takings Clause to a statute authorizing the demolition of housing that is declared unsafe).

69. 515 U.S. 557 (1995).

70. *Id.* at 569 (internal citations omitted).

71. *Id.*

> message. . . . Were the South Carolina court's analysis to prevail, much of the most critically acclaimed art and literature would lose its constitutional protection by virtue of the critics' inability to agree about what message it conveys.[72]

An example of an appropriate application of the *Spence* test can be found in *Clark v. Community for Creative Non-Violence.*[73] In *Clark*, demonstrators who wanted to conduct a demonstration in Lafayette Park and the Mall in Washington, D.C., on behalf of the city's homeless people challenged a regulation that prohibited camping in national parks except in areas designated for that purpose.[74] The Park Service issued permits for the demonstration and for the construction of symbolic tent cities but would not permit the demonstrators to sleep in the parks.[75] The regulation in *Clark* was aimed primarily at nonexpressive conduct, with the purpose of protecting the National Parks by prohibiting camping in inappropriate areas.[76] The challenge to the regulation was in its application to demonstrators, who claimed that it interfered with their rights to express their views.[77] The regulation in *Clark* was not an outright ban on an entire class of expression. It was upheld as a reasonable time, place, or manner restriction on protected speech, and the demonstrations were allowed to continue, subject to the regulation's requirements.[78]

"[A] message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative," and such conduct may be regulated, but only "if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech."[79] The same test cannot apply to every First Amendment challenge. In *Joseph Burstyn, Inc. v. Wilson,*[80] the United States Supreme Court held that a state cannot ban a film on the basis of a censor's opinion that it is sacrilegious.[81] The Court stated that motion pictures are not necessarily subject to the same rules governing any other particular method of expression, because each method of expression is unique.[82] The basic principles of the First Amendment do not vary, and those

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72. Brief of Amicus Curiae Center for Individual Freedom in Support of Petition for a Writ of Certiorar: at 3 n.3, 4, White v. South Carolina, 537 U.S. 825 (2002) (No. 01-1859).
73. 468 U.S. 288 (1984).
74. *Id.* at 290–92.
75. *Id.* at 291–92.
76. *Id.* at 295.
77. *Id.* at 292.
78. *Id.* at 294.
79. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984).
80. 343 U.S. 495 (1952).
81. *Id.*
82. *Id.* at 503.

principles make freedom of expression the rule.[83] Like filmmaking, tattooing is an art form in its own right, and it is a significant medium for the communication of ideas that "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression."[84]

### *1. Obscene Art is Not Protected Under the First Amendment*

In its attempt to justify the ban, the State of South Carolina argued that art is *never* automatically entitled to First Amendment protection.[85] However, under United States Supreme Court decisions, the only form of art that is not protected under the First Amendment is that which is determined to be obscene. "[T]he freedom of speech and of the press protected by the First Amendment has been interpreted to embrace purely artistic as well as political expression (and entertainment that falls far short of anyone's idea of art . . .) unless the artistic expression is obscene in the legal sense."[86] In *Kaplan v. California*,[87] the United States Supreme Court held that pictures, films, paintings, drawings, engravings, books, and speech all have First Amendment protection, with only the qualification that obscenity is not protected by the Constitution.[88] There is no national standard of obscenity; contemporary community standards of each state are adequate to establish what is and is not obscene.[89] However, the South Carolina Supreme Court did not suggest that the entire art form of tattooing should be considered "obscene" in the legal sense; nor could they, bearing in mind that the "obscene" work in *Kaplan* was described as being "made up entirely of repetitive descriptions of physical, sexual conduct, 'clinically' explicit and offensive to the point of being nauseous. . . . Almost every conceivable variety of sexual contact, homosexual and heterosexual, [was] described."[90] Although some people may view tattooing as offensive, it surely does not rise to the level of "obscene."

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83. *Id.*

84. *Id.* at 501.

85. Brief in Opposition to Petition for Writ of Certiorari at 8, White v. South Carolina, 537 U.S. 825 (2002) (No. 01-1859).

86. Piarowski v. Illinois Cmty. Coll., 759 F.2d 625, 628 (7th Cir. 1985) (internal citations omitted).

87. 413 U.S. 115 (1973).

88. *Id.* at 119–20; (citing Miller v. California, 413 U.S. 15, 23–25 (1973); Roth v. United States, 354 U.S. 476, 483–85 (1957)).

89. *Id.* at 121.

90. *Id.* at 116–17.

*2. The Process of Tattooing*

Instead of defining tattooing as obscene, the Supreme Court of South Carolina made a distinction between the *process* of tattooing and the wearing of a tattoo, suggesting that although the process of creating the art is not protected, the wearing of the art may be.[91] This conclusion is not rational. In *Lamphear v. Massachusetts,*[92] the Suffolk County Superior Court found that it could not separate the act of creating a tattoo from the tattoo itself, because "[t]he act of creating a tattoo is intrinsically part of the expressive content of the art," and is therefore protected under the First Amendment.[93] In an interview with Dan Abrams on MSNBC,[94] White responded to the South Carolina Supreme Court's argument in his own words:

> [T]he customers that come to me specifically come to me for my designs. They ask me to design something as I interpret it to reflect their statement.
>
> This is called custom tattooing. This is not me tracing a design that they brought to me. This is me creating art from my heart directly onto their body.[95]

Justice Waller, in his dissent in *White*, said that the majority's view was "akin to saying that an author who is paid a commission to write a book by the publisher, or an artist commissioned to paint a rendering, does not engage in speech, but that the publisher, and purchaser of the painting, do engage in speech."[96] In his opinion, such an analysis was untenable.[97] A law that prohibits artists from creating art necessarily burdens the freedom of expression, as would a law "prohibiting a sculptor from chiseling stone, or a writer from typing, or a dancer from dancing. The only way one can have a tattoo is by an artist creating and applying the art of tattooing."[98]

In its Brief in Opposition to Certiorari, the State of South Carolina argued that if White's position was accepted, then "if a person decides that animal sacrifice is part of his 'artistic expression,' a state's animal cruelty laws would

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91. State v. White, 348 S.C. 532, 538, 560 S.E.2d 420, 423 (2002).

92. No. 99-1896-B (Mass. Super. Ct. Oct. 20, 2000) (Memorandum of Decision and Order for Judgment on Cross-motions for Summary Judgment).

93. *Id.* at 10—1.

94. Interview by Dan Abrams with Ronald White, *The Abrams Report* (2002), *available at* www.msnbc.com (last visited Sept. 7, 2002).

95. *Id.*

96. *White*, 348 S.C. at 542 n.9, 560 S.E.2d at 425 n.9 (Waller, J., dissenting opinion).

97. *Id.*

98. Final Brief of Appellant at 5, State v. White, 348 S.C. 532, 560 S.E.2d 420 (2002) (No. 25421).

become subject to strict scrutiny as restrictions on free speech."[99] The State pointed out that "few could seriously claim that statutes outlawing bearbaiting, cockfighting, and other brutalizing animal sports, violate the First Amendment or any other constitutional provision."[100] However, it should not be too difficult to decide where to draw the line between tattoo art and cruelty to animals, and arguments such as this only underscore the lack of rational explanation for the South Carolina Supreme Court's distinction between the process of creating a tattoo and the tattoo itself.

### *C. The Proper Level of Scrutiny*

The trial court essentially concluded that it is not the place of the court to review legislative judgment, and that even if tattooing is speech, the ban is a valid exercise of the State's police power, justified by public health and safety interests:[101]

> Whether tattooing be an art form, we do not deem it speech, or even symbolic speech. However, even pure speech may be subject to reasonable regulation or prohibition, if it impacts on public health. You can't holler fire in a theatre or do something that impacts on public health. . . .
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> The defendant in this case admits there is risk inherent. There is in other words danger without regulation. There is [sic] no regulations in South Carolina. It is specifically prohibited except with the enumerated exceptions in the statute. When the object of legislation is not the suppression of free speech, but the promotion of public health, there is no constitutional violation even if there is some incidental interference with liberty or property.[102]

The Supreme Court of South Carolina affirmed the trial court's decision, upholding the regulation under the rational basis test, in the mistaken belief that tattooing is not protected under the First Amendment. The court found "that the danger associated with the activity of tattooing, whether artwork or not, is a legitimate reason to regulate it."[103] The court further held that the statute is not

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99. Brief in Opposition to Petition for Writ of Certiorari at 9, White v. South Carolina, 537 U.S. 825 (2002) (No. 01-1859).

100. *Id.* (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.15 (1973)).

101. *White*, 348 S.C. at 535, 560 S.E.2d at 422.

102. Record on Appeal at 66–68, *White*, 348 S.C. at 535, 560 S.E.2d at 422 (No. 25421) (including the transcript of the trial court judge's opinion of the law).

103. *White*, 348 S.C. at 538, 560 S.E.2d at 423. This may be true, but South Carolina does not regulate the art of tattooing; it has banned it. White is asking the State to regulate it.

subject to heightened scrutiny, and "[c]ourts will not interfere with the enforcement of regulations designed for the protection of health, welfare, and safety of citizens unless they are determined to be unreasonable."[104] However, a regulation that bans an entire art form *is* subject to a heightened scrutiny under the First Amendment. Although the precise level of scrutiny depends on whether the ban is content-based or content-neutral, South Carolina's complete ban cannot be justified under either heightened or intermediate levels of First Amendment scrutiny.

### *1. Strict Scrutiny Under the First Amendment*

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal."[105] When laws restrict speech on account of its message or the image that it conveys, those laws violate this essential right. "Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas . . . through coercion rather than persuasion."[106]

For this reason, the First Amendment prohibits governmental control over the content of messages expressed by private individuals.[107] United States Supreme Court precedent applies "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."[108] On the other hand, regulations that are content-neutral are subject to a less rigorous intermediate level of scrutiny, "because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."[109]

"Public health and safety concerns" are not magic words that dispel heightened scrutiny under the First Amendment. Rather, once it has been determined that expression is burdened, the presence of health concerns is only one factor to be considered as part of a court's First Amendment scrutiny.[110] Other considerations are whether the ban is justified without reference to the content, nature, and degree of the government interest that it furthers, and

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104. *Id.* at 539, 560 S.E.2d at 424 (citing Main v. Thomason, 342 S.C. 79, 86–87, 539 S.E.2d 918, 921–22 (2002) (alteration in original)).

105. Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 641 (1994).

106. *Id.*

107. *Id.*

108. *Id.* at 642.

109. *Id.*

110. *See* Reply to Brief in Opposition at 2, White v. South Carolina, 537 U.S. 825 (2002) (No. 01-1859); Brief of Amicus Curiae Center for Individual Freedom at 5–6, *White* (No. 01-1859) (citing Hill v. Colorado, 530 U.S. 703, 715 (2000); *Turner Broad. Sys., Inc.*, 512 U.S. at 662).

whether the ban is no greater than is essential to the furtherance of that interest.[111] Once the court has determined whether the restriction is content-based or content-neutral, it must balance the nature and extent of the State's asserted interest in health and safety and determine whether there are reasonable alternatives that are less restrictive.

The principal inquiry in determining whether a regulation is content-based or content-neutral is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys,"[112] or, as in this case, disagreement with the image that it presents. "Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'"[113] There are two possible justifications for South Carolina's ban on tattooing: (1) the South Carolina Legislature and South Carolina Supreme Court believe that the dangers of tattooing in the year 2002 are such that it must be completely banned, in which case the statute is content-neutral, or (2) they have put forth the State's interest in public health and safety as a thin front to shield the state from "the wrong image," in which case the statute is content-based. In either case, the ban cannot be justified.

South Carolina's ban on tattooing is content-based because it is a religiously motivated attempt to shield the State from "the wrong image."[114] The content at issue is not any one message conveyed by a particular piece of art. It is the content of the art form in general, which creates an image that is perfectly acceptable to many people and yet offensive to others.

In most cases, laws that impose burdens on speech without reference to the ideas or views expressed are content neutral. The purpose of such a law will often be evident on its face. Furthermore, an alleged illicit motive resting on little more than speculation is not sufficient to determine that a law is content-based.[115] The motive for the continued ban on tattooing in South Carolina, however, is well documented and much publicized. At trial, a witness for White, who had lobbied for eight years to lift the ban on tattooing, testified that ninety-nine percent of the legislative opposition to his efforts was based on religious and biblical implications—opponents told him that tattooing is

111. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968).

112. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Cmty. for Creative Non-violence, 468 U.S. 288, 295 (1984)).

113. *Id.* at 791 (quoting *Clark*, 468 U.S. at 293).

114. *Turner Broad. Sys., Inc.*, 512 U.S. at 643.

115. *O'Brien*, 391 U.S. at 383; *cf.* Church of the Lukumi Babalo Aye v. Hialeah, 508 U.S. 50 (1993) (looking beyond the facial neutrality of a ban on animal sacrifice and striking it down where members of the community sought to target a particular religion); *see also*, Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down an Alabama school prayer statute where the purported state purpose was contradicted by the unequivocal testimony of the Bill's sponsor that it was intended to return voluntary prayer to schools).

immoral.[116] He further testified that he was forced to leave the state because of the attacks his family and children underwent due to his efforts.[117]

Senator William C. Mescher introduced legislation in the South Carolina State Senate on five different occasions between 1994 and 2001 to lift the ban.[118] His goal was to bring tattooing out of its present underground status and to let the State Department of Health and Environmental Control regulate it, with a bill allowing people twenty-one and older to get a tattoo below the neck.[119] However, each time the bill reached the House of Representatives it was killed through the efforts of then-Representative Jake Knotts, who "saw the effort to kill the anti-tattoo law not just as a matter of principle but as a good political issue, and . . . used his parliamentary skills to single-handedly tie it up in knots."[120] Knotts took the moral high ground on radio talk shows and on the House floor, railing against tattoos and saying that "tattoo parlors are bad for South Carolina's image, unclean and even ungodly."[121] Senator Mescher has said, "Once he starts quoting the Bible, people around here start running like quails."[122]

Knotts wants "to keep the state free of seedy tattoo parlors,"[123] saying that he will "continue to fight unless he was brought a letter from the President of the South Carolina Southern Baptist Convention, [and] saying he'll oppose it because it [is] his belief that it is against God's will."[124] The Washington Times reported that the opponents to the bill are motivated by the sentiment that tattoos are sinful and un-Christian.[125] Knotts says, "If the Lord wanted you to have a tattoo, He would have put it on you," and that he is "trying to make sure this state does not have a tattoo parlor on every corner."[126] He says that there is a biblical mandate to avoid marking the body, and that "[i]t's spelled out very vividly in the Bible that tattooing is taboo . . . I am opposed to it, and it ain't

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116. Record on Appeal at 53–54, State v. White, 348 S.C. 532, 560 S.E.2d 420 (2002) (No. 25421).

117. *Id.* at 54.

118. Letter from Debbie W. Griffin, Director of Research and Chief of Staff, Senate General Committee, to the author 1 (July 29, 2002) (on file with *South Carolina Law Review*).

119. Eric Kenneth Ward, *Lawmaker: "Good Chance" of Legal Tattooing in S.C.*, COLUMBIA FREE TIMES, March 13, 2002, *available at* http://www.freedomtattoo.com/TextArticles/FederalCourtsAvenue.htm.

120. Robert S. Greenberger, *Tattoo Taboo: In South Carolina, You Can't Get One*, THE WALL ST. J, July 22, 2002, at A10.

121. *Id.*

122. *Id.*

123. Associated Press, *Former Clinton Investigator Joins Challenge to Tattoo Ban*, THE STAR TRIB., July 23, 2002, *available at* http://www.startribune.com.

124. John Plummer, *Testing the First Amendment & Tattoo Law I*, CIRCLE MAG., *available at* http://circlemagazine.com/testingthefirst.html (last visited Sept. 7, 2002).

125. Steve Chapman, *Skin-deep Censorship Speech?*, THE WASH. TIMES, July 27, 2002, *available at* http://www.washtimes.com.

126. *Id.*

gonna pass. I'll do whatever I got to do to stop it."[127]

White has not imposed his ideas on a captive audience; persons who are offended by the art of tattooing are not forced to get tattoos or observe tattoos being given, and do not have to look at other persons' tattoos.[128] The United States Supreme Court in *Spence* noted that it "is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[129] It appears clear from the record that the South Carolina legislature has banned tattooing in the State because of disagreement with the image that it represents, and that the ban cannot be justified without reference to its moral and religious underpinnings. The statute is therefore content-based, and as such it should be presumed invalid.

### 2. *Intermediate Scrutiny Under the First Amendment*

South Carolina's ban on the art of tattooing cannot withstand either level of First Amendment scrutiny. Even when regulations are unrelated to the content of the burdened expression, they are subject to an intermediate level of scrutiny,[130] and a content-neutral regulation will only be sustained if "'it furthers an important governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'"[131]

In recent decades, understanding of the risks associated with tattooing and the proper precautions to alleviate those risks has increased, and it is widely accepted that the art of tattooing can be practiced safely.[132] However, the South Carolina Supreme Court determined that there were inherent risks to tattooing, and that the legislature therefore has "wide latitude to determine how to best protect the general welfare of the state's inhabitants."[133] This conclusion was based on "the court's common knowledge"[134] and White's testimony that, where proper sterilization measures are not taken, tattooing creates risks.[135] From this, the court inferred that White had "conceded a rational relationship

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127. Eric Kenneth Ward, *Needling South Carolina*, COLUMBIA FREE TIMES, June 19, 2002, *available at* http://www.free-times.com/archive/coverstorarch/needlingsc.html.

128. *See* Spence v. Washington, 418 U.S. 405, 412 (1974).

129. *Id.* (quoting Street v. New York, 394 U.S. 576, 590–94 (1969)).

130. Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 642 (1994).

131. *Id.* at 662 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

132. Petition for Writ of Certiorari at 17, State v. White, 348 S.C. 532, 560 S.E.2d 420 (2002) (No. 25421).

133. *White*, 348 S.C. at 536, 560 S.E.2d at 422.

134. *Id.*

135. *Id.* at 540, 560 S.E.2d at 424.

between tattooing and public health."[136]

The State of South Carolina must do more than simply "'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[137] There was no finding at any time by the South Carolina Supreme Court as to potential health risks posed by tattooing, other than the court's "common knowledge and the conclusory statement that White conceded that health risks exist."[138] The United States Supreme Court has said that it may not simply assume that a law advances an asserted state interest sufficiently to justify a burden on expression,[139] and that "a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."[140]

In the trial court, White introduced testimony from a member of the board of directors of the Alliance of Professional Tattooists, who is licensed to practice tattooing in twelve states.[141] This witness testified that the American Medical Association has guidelines on tattooing, and that the Federal Code of Regulations contains guidelines designed to prevent the spread of blood-borne pathogens.[142] He outlined the procedures followed to prevent the risk of disease, which include autoclave sterilization, single-use needles that are disposed of in front of the client, and barrier controls such as gloves, plastic to cover all equipment, and bibs to cover the artist.[143] He essentially testified that, in the absence of reasonable regulations, a large number of persons were tattooing unsupervised because there was not a legal outlet for them, and that reasonable regulations would be much safer than a complete ban.[144] The State introduced no evidence or testimony to show how the ban on tattooing advances the State's interest in safety.

The Centers for Disease Control (COC) notes that there is only a risk of HIV transmission in tattooing if needles are not sterilized or disinfected or if they are re-used with different clients.[145] It recommends that needles be sterilized or that they be used only once.[146] The CDC also reports that, in the

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136. *Id.*

137. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (quoting Quincy Cable T.V., Inc. v. FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

138. *White*, 348 S.C. at 540, 560 S.E.2d at 424.

139. *Turner*, 512 U.S. at 664 (quoting Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986)).

140. *Id.* (quoting Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir. 1977)).

141. Record on Appeal at 51, 59, Supreme Court of South Carolina, *White*, 348 S.C. 532, 560 S.E.2d 420.

142. *Id.* at 55, 59.

143. *Id.* at 56.

144. *Id.* at 60.

145. Centers for Disease Control, *Can I Get HIV From Getting a Tattoo or Through Body Piercing?, at* http://www.cdc.gov/hiv/pubs/faq/faq27.htm (last visited on Aug. 31, 2003).

146. *Id.*

United States, case-control studies have shown no association between Hepatitis C and tattooing.[147] In the past fifteen years, only one percent of Hepatitis C patients who denied intravenous drug use also reported having tattoos or ear piercings.[148] The CDC states that "no data exist in the United States indicating that persons with exposures to tattooing and body piercing alone are at increased risk of HCV [Hepatitis C] infection."[149] Risk factors for Hepatitis C that have been identified by the CDC in case-control studies include blood transfusions, intravenous drug use, multiple sex partners, and low socioeconomic level.[150]

The blind reasoning of the South Carolina court was echoed by Professor Paul Rothstein of Georgetown University Law School during the course of White's interview on MSNBC.[151] Professor Rothstein stated that "there are real health dangers of hepatitis and AIDS. I don't know if you heard Pamela Anderson talking about her tattoos. She got hepatitis from a tattoo needle. So I think the state really does have the power to take steps here."[152] This type of reasoning is inexplicable, whether it comes from a professor of law or a state supreme court justice. When First Amendment rights are implicated, the court must exercise independent judgment so as "to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."[153] Even when First Amendment interests are burdened incidentally, "the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures."[154]

Even if South Carolina's ban on tattooing is content-neutral, it fails the test for intermediate scrutiny, because there was no showing whatsoever that it "furthers an important or substantial governmental interest," or that the incidental restriction is no greater than is essential to the furtherance of the asserted government interest.[155]

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147. Center for Disease Control, *Hepatitis C Transmission Modes*, *at* http://www.cdc.gov/ncidod/diseases/hepatitis/c_training/edu/1/epidem-trans-5.htm (last visited on Aug. 31, 2003).

148. *Id.*

149. *Id.*

150. *Id.*

151. Interview by Dan Abrams, *supra* note 94.

152. *Id.*

153. Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 666 (1994).

154. *Id.* (quoting Century Communications Corp. v. FCC, 835 F.2d 292, 304 (D.C. Cir. 1987).

155. *See id.* at 662.

*3. Less Restrictive Alternative*

Under either strict scrutiny or intermediate scrutiny, the court must engage in an analysis of whether there is a less restrictive alternative regulation.[156] In *Schad v. Borough of Mt. Ephraim*,[157] the United States Supreme Court emphasized that "the Court must not only assess the substantiality of the governmental interests asserted but also determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment."[158] In *Ward v. Rock Against Racism*,[159] the regulation in question gave the city authority to provide its own sound technician and equipment for concerts at a bandshell in Central Park; this regulation served the dual purpose of limiting the volume and improving the quality of performances at the bandshell.[160] The United States Supreme Court stated that the city of New York was not required to prove that its content-neutral regulation was the least intrusive means of achieving the governmental interest.[161] However, the Court made an in-depth inquiry into the nature and extent of the government interest in noise control,[162] noted that the city had considered various solutions for the noise problem and described the solutions that had been considered by the city,[163] and ultimately found that the regulation was "narrowly tailored to serve a significant government interest."[164] The Court also noted it was not reaching the issue of whether the city could go so far as to select the performances and control their quality,[165] and it is probably understood that the city does not have the authority to completely ban rock concerts in the city. Even though the Court stated that the government did not have to prove that it had utilized the least restrictive means, there was still a thorough inquiry into the nature of the government interest, what the available alternatives were, and an express finding that the least restrictive means had been used. Certainly the circumstances of *Ward* were considerably less oppressive than those in *White*.

Despite having an incredible amount of information on reasonable alternatives available to it, the State of South Carolina did not even attempt to show that the state's complete ban on tattooing is "narrowly tailored to serve

156. *See, e.g.*, Am. Library Ass'n v. Reno (D.C. Cir. 1994) (inquiring into whether a regulation of the content of sexually explicit websites was narrowly tailored).

157. 452 U.S. 61 (1981).

158. *Id.* at 70.

159. 491 U.S. 781 (1989).

160. *Id.* at 787, 790.

161. *Id.* at 789–90.

162. *Id.* at 784–89.

163. *Id.* at 786–87.

164. *Id.* at 796 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

165. Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

a significant government interest."[166] The South Carolina Supreme Court could have looked to the regulations of forty-eight other states to determine if there was a less restrictive alternative available, or it could have considered the testimony that was introduced on the matter in the trial court.[167]

The South Carolina Supreme Court cannot avoid its duty to inquire into alternative means by ignoring it. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative,"[168] and the only way to determine whether there is a less restrictive alternative that would serve the government's purpose is for the court to inquire into the matter. The record must provide "judicial findings concerning the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests,"[169] and there were no such findings in the South Carolina court's decision.

## IV. SUMMARY AND RECOMMENDATIONS FOR FURTHER ACTION

Since the United States Supreme Court has declined to hear White's case, it is up to the South Carolina legislature to take action. It is undeniable that the art of tattooing is an important part of our nation's culture, and that it is an important form of expression for many people. "Today, tattooing is the sixth fastest growing retail industry in the country and is believed to be the most commonly purchased form of original artwork in the United States."[170] Regulatory schemes for the tattoo industry that fully address health and sanitation concerns without infringing on the First Amendment rights of tattoo artists and their clients have been implemented across the country.[171] The cost of regulation is not prohibitive. The Department of Public Health in Massachusetts determined that implementation of a regulatory scheme similar to those in most states would result in a net profit.[172] Implementation would cost $100,000 the first year and $50,000 each subsequent year, and licensing fees and business and income taxes paid by tattoo artists would exceed costs incured by the state.[173]

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166. *Id.* at 791.

167. *See* Record on Appeal at 55–56, State v. White, 348 S.C. 532, 560 S.E.2d 420 (2002) (No. 25421) (witness' testimony as to effectiveness of regulations in twelve other states).

168. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (citing Reno v. ACLU, 521 U.S. 844, 874 (1997)).

169. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 668 (1994).

170. Memorandum of Decision and Order for Judgment on Cross-motions for Summary Judgment, Lanphear v. Commonwealth of Massachusetts, No. 99-1896-B (Mass. Super. Ct. Oct. 20, 2000).

171. Memorandum of Law in Support of Plantiff's Motion for Summary Judgment at 13, *Lanphear* (No. 99-1896-B).

172. *Id.*

173. *Id.*

When a law such as this impacts First Amendment interests, even incidentally, the government must justify its measures by providing some type of "empirical support or at least sound reasoning on behalf of its measures."[174] "The extent to which the statute actually furthers the State's interest in public health and safety remains a mystery because, as the state court noted, the State 'failed to introduce current evidence of the risks associated with tattoos.'"[175] "Thus, whether the restriction *substantially* furthers the State's *important* interest is impossible to ascertain, and the restriction should be struck down on that ground alone."[176] Also, South Carolina has not even attempted to show that the restriction is "narrowly tailored to serve a significant governmental interest." It is not likely that South Carolina can show that its asserted interest in public health and safety could not be achieved as effectively without a complete ban on tattooing. "After all, forty-eight other states have chosen substantially less restrictive means, such as sterilization and licensing requirements," and South Carolina has provided no explanation whatsoever as to why this would not be effective in South Carolina as well.[177]

"The art of tattooing is a historic and well-established form of artistic expression,"[178] and it deserves protection as such under the First Amendment. The Supreme Court of South Carolina's reliance on cases that ask whether certain types of conduct contain a particularized message is misplaced, and can only be interpreted as a statement by the court that they do not see tattooing as art. However, the First Amendment's protection is not dependent upon the likes and dislikes of supreme court justices or members of the legislature. "[T]hese judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority."[179]

*Bobby G. Frederick*

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174. *Turner Broad. Sys., Inc.*, 512 U.S. at 666.

175. Brief of Amicus Curiae Center for Individual Freedom in Support of Petition for a Writ of Certiorari at 7, White v. South Carolina, 537 U.S. 825 (2002) (No. 01-1859) (quoting State v. White, 348 S.C. 532, 540, 560 S.E.2d 420, 424 (2002)).

176. *Id.*

177. *Id.* at 8.

178. Petition for Writ of Certiorari at 10, *White* (No. 01-1859) (citing THE DICTIONARY OF ART 366 (Macmillan 1996)).

179. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 818 (2000).